No. 1804.

United States
Circuit Court of Appeals

FOR THE NINTH CIRCUIT

The Southern Pacific Company, a corporation, et al.,
Appellants and Defendants,
vs.
The Arlington Heights Fruit Company, et al.,
Appellees and Complainants.

APPELLEES' CLOSING BRIEF.

JOSEPH H. CALL,
ASA F. CALL,
Attorneys for Appellees.

LEVY MAYER,
Of Counsel.

Parker & Stone Co., Law Printers, 238 New High St., Los Angeles, Cal.

No. 1804.

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

The Southern Pacific Company, a corporation, et al.,
Appellants and Defendants,
vs.
The Arlington Heights Fruit Company, et al.,
Appellees and Complainants.

APPELLEES' CLOSING BRIEF.

I.

The contention in "Appellant's Closing Brief" is that all of the grounds of the pleas of defendants went to the *jurisdiction of the court,* the first being to the jurisdiction of the persons of defendants and the second to *jurisdiction over the subject matter of the action,* and consequently it is contended that the plea upon the second ground does not operate as a waiver of the first, notwithstanding the authorities cited in Brief for Appellees (pp. 7-10) upon the subject. In support of their posi-

tion counsel for appellants cite Davidson Brothers v. Gibson, 213 U. S. 10. In that case the defendants demurred on the grounds first "That the court has no jurisdiction of the defendants or either of them." "Fifth. That this court has no jurisdiction of the subject of the action." "Sixth. That this court has no jurisdiction of the controversy alleged in the complaint."

In the decision in the Davidson case the court did not consider, discuss or decide the question as to whether the fifth and sixth grounds of the demurrer operated as a waiver of the first ground. That point was not presented in argument nor was it considered nor decided by the Supreme Court or the Circuit Court of Appeals, and consequently cannot be considered an authority supporting appellant's contention in the present case. The only point presented, considered or decided in the Davidson case was whether the court by rule might require a waiver. Moreover there is no authority cited to the effect that a joinder of pleas upon the two grounds does not waive the objection. On the contrary the Fitzgerald case (137 U. S. 98) has not been overruled and in that case as appears from the syllabus and from the opinion of the court, was distinctly predicated upon the ground as stated by the court as follows (p. 106):

> "there was no action on its (the defendant's) part confined solely to the purpose of questioning the jurisdiction over the person. That such jurisdiction resulted under the circumstances admits of no doubt. * * *"

(a) Admitting however, for the purposes of argument only, that the Davidson case is an authority holding that a plea to the jurisdiction over the persons of

the defendants, coupled with a plea to the jurisdiction of the subject matter of the action, is not a waiver of the first ground, we submit to the court that the case has no application here for the following reasons: The defendants filed their pleas to the jurisdiction upon the following grounds: First. That the defendants were non-residents of the district and that the court had no jurisdiction over their persons and upon the further ground stated in the exact language of the pleas as follows:

> "2. That this court has no jurisdiction to determine whether a rate published by defendants as required by law is reasonable or unreasonable prior to the determination thereof by the Interstate Commerce Commission, but that such jurisdiction is vested exclusively in the Interstate Commerce Commission by the Act of Congress approved February 4, 1887, entitled "An Act to Regulate Commerce," and the acts amendatory thereof and supplementary thereto." (R. 61.)

(b) We submit that there is a material difference between a plea objecting to the jurisdiction of the court over the subject matter of the action and a plea objecting that the court has no jurisdiction to determine the reasonableness of a rate published by defendants as required by law prior to the determination thereof by the Interstate Commerce Commission. The difference between the two propositions is plain. One goes to the *power* of the court to hear or determine the case *at all* while the other without objecting to the jurisdiction of the court under the Constitution and laws to hear and determine such a case, in effect says that the relief which the plaintiff seeks cannot be obtained in this court in equity for the reason that the Interstate Commerce Com-

mission is empowered to hear and determine the question as to reasonableness of rates and after a final hearing to make an order with respect thereto. If appellants had rested their objection solely on the jurisdiction of the court over the subject matter of the action without setting forth their reasons why the court could not act, they might have come within the rule which they contend for, but they were not content with resting their objections upon the question of jurisdiction alone over the subject matter. They went on to give their reasons and the reasons which they give are those which go to the want of equity and which are the real reasons which are urged in this court to now sustain the contention that this court is without jurisdiction to grant the equitable relief sought in view of the administrative powers given to the commission.

Defendants do not ask a dismissal of the case for *want of jurisdiction* in the court below, but ask for dismissal *without prejudice* (App. closing brief, p. 19), and this would carry a judgment for costs. (Br. for Appellees, p. 12.)

Although appellants have used the word "jurisdiction" in their second ground of the plea they have clearly defined what they meant by that word in showing further on that their contention was to the want of equity because of what they contend is a plain, speedy and adequate remedy by legal procedure. As counsel say our construction of the bill is that it does not invade the province of the commission, but their contention by plea and argument is, that we do invade the commission's duties. Thus the scope and purpose of the bill and the

scope and powers of the commission are presented by the plea.

(c) The appellants did not by their pleas or otherwise object to the jurisdiction of the court to the subject matter of this action but their objection was limited solely to a determination by the court "whether a rate published by defendants as required by law is reasonable or unreasonable *prior* to the determination thereof by the Interstate Commerce Commission." The jurisdiction of this court to hear and determine such a case as the present one is conceded by the defendants and the only objection made is that the suit is *prematurely brought* and should be entertained only *after* the Interstate Commerce Commission has passed upon the reasonableness of the rates. *The question raised goes to the abatement of the suit until the commission has passed upon the question of rates and does not go to the question of jurisdiction over the subject matter* and indeed, under the Constitution and laws such an objection could not be reasonably made.

II.

Courts of Equity Will Not Interfere with Administrative Powers of Interstate Commerce Commission.

The controlling factor in the administration cases of Baltimore and Ohio Railroad v. Pitcairne Coal Company, Interstate Commerce Commission v. Illinois Central Railroad Company, and in Texas Pacific Railroad v. Abilene Cotton Oil Company, is that in each of those

cases relief was sought by shippers in the courts, against the railroads, which required a decision from the courts as to matters of rates or of regulations as to which the Interstate Commerce Commission had been given jurisdiction by the Interstate Commerce acts, and which decisions by the courts based on the judgment of the courts, would result in a different decision from that of the commission or might so result, and which would therefore lead to inextricable confusion as to which authority would prevail.

We have no controversy with the Supreme Court as to the correctness of those decisions nor as to the necessity of holding as the court did in those cases.

The present case is not brought to secure a determination as to any matter or thing which can be heard by the Interstate Commerce Commission, but was brought in aid of a pending proceeding before the commission to prevent an unlawful advance in rates until and only until the commission can hear and determine the case pending before it—an advance in rates which will result in irreparable injury to complainants and which the commission has no constitutional power to prevent.

It cannot be contended upon any of the authorities cited by appellants, including those above named, that there is even an intimation or suggestion that the jurisdiction of the Circuit Courts of the United States in equity, in a case like the present one, has been repealed, annulled or in anywise curtailed by any express repealing act or by inference from any of the Interstate Commerce acts.

We are in full accord with all of those who are seek-

ing to support the powers of the Interstate Commerce Commission to the utmost as a great tribunal created by congress under the commerce clause of the Constitution to administer and carry out the regulation of commerce.

We seek to aid that tribunal by preventing an illegal act resulting in great and irreparable injury until the commission can lawfully hear and determine the case pending before it.

Oral Argument of Joseph H. Call.

May it please Your Honors: The plaintiffs in the court below—appellees here—are growers, raisers and packers of citrus fruit, including lemons, comprising some 60 different associations; they filed their bill in equity in the Circuit Court for the Southern District of California against the Southern Pacific Company, the Atchison, Topeka & Santa Fe Railroad Company and the San Pedro, Los Angeles & Salt Lake Railroad Company, and also against the Transcontinental Freight Bureau, an association of railways of which the three railways named are parties, and other railways, a large number of them too numerous to be made parties to the bill, and which, in fact, is a number exceeding 500, as I am informed, all of these companies being parties in a way to a joint tariff of rates on citrus fruit and on lemons. That rate that I am speaking of was a rate which was regularly filed and put into effect some five or six years previously, fixing a rate on citrus fruit, by a tariff filed with the Interstate Commerce Commission. The rate fixed was one dollar per 100 lbs. for lemons in carload lots from Southern California to all points east of the Rocky Mountains—what they call the postage stamp rate, be-

ing the same rate applied to all points east of the Rocky Mountains, there being an average center of distribution of that freight in the neighborhood of Cincinnati, Ohio, on oranges, and which center of distribution on lemons is in the neighborhood of Des Moines, Iowa, the haul on oranges being five hundred miles longer than on lemons.

Five years before the growers of citrus fruit in California had a long controversy with the transcontinental railroads as to the rate on citrus fruit, which controversy was terminated by a decision of the Interstate Commerce Commission. (Vol. 10 I. C. C. 590-628.) The Interstate Commerce Commission found that the old rate of $1.25 per hundred lbs., in carload lots, on oranges, was an excessive and an unreasonable rate, and that $1.10 a hundred was a reasonable and a just rate unless the time was changed and greater celerity given to the movement, in which case they decided that $1.15 would be a just rate. And as to lemons, pending that hearing before the commission, it was shown that the lemon business could not be made profitable in California under a railroad tariff of $1.25 a hundred; that many thousands of acres of groves had been planted out and carried into bearing at great expense, at an expense of from one thousand to twelve hundred dollars an acre; then it was found that the rate was so excessive that the business was unprofitable, and it resulted in a destruction of many thousands of acres of lemon groves; trees were dug up and the ground was devoted to other uses. In that state of the case, and after that testimony was taken before the Interstate Commerce Commission,

the railways voluntarily reduced the rate pending the hearing to $1.00 per 100 lbs.; that has been the rate ever since. So the commission found upon those facts that the rate of $1.00 per hundred lbs. was a reasonable and a just rate, and made no order with respect to that, except to make that single finding because the rate had been reduced. Now, after five years the railways advanced this rate. The growers of lemons had gone on and assuming that the dollar rate was a permanent rate they replanted their groves and brought many groves into bearing by budding over, and have developed a great and growing industry in lemons.

The situation, as shown by the bill, with respect to the markets, is this: In 1897 it was found that the California lemon growers were unable to compete with the Italian and Sicilian lemons. The bill, and the proofs in this case, show that the cost of labor in Sicily, which produces the bulk of the world's supply of lemons, and the cost of transportation to Atlantic seaboard points are only 25% of the cost of labor and transportation for the California lemon. The proceedings on the former hearing showed that for three years, or thereabouts, the lemon growers met with a great loss in growing lemons, the loss running into some millions. During that time the railroad companies were transporting from 20,000 to 25,000 carloads of citrus fruit, and the freight and refrigeration was close to $400 a car, making during the last year freight and refrigeration of $12,000,000, which went to the railroad companies for freight for moving a single year's crop, and at a time when the growers were not making anything, but were actually mortgaging

their property to pay this freight rate. Those were the facts shown to the Interstate Commerce Commission, and, in fact, so found. Those are the facts set forth in the bill.

Last year these matters were taken before congress, at the time of the reformation of the tariff, and it was shown to congress that the freight on lemons from Sicily and Italy was about 25 cents a hundred, and the actual labor cost of producing lemons in Sicily and Italy was only 25 cents a hundred. So to meet that situation, on account of the large outlay of American money going abroad, congress increased the tariff on lemons to 1½ cents a lb., or $1.50 a hundred. Under that tariff the California lemon industry could meet on an equal footing the Italian and Sicilian lemons at any point west of the Alleghany Mountains; but if the rail rates on California lemons is advanced the foreign crop will take the Mississippi Valley country, comprising our principal markets. We never have been able to compete with the foreign crop of lemons east of the Alleghanies; that market is almost wholly, if not entirely monopolized by the foreigners; but west of the Alleghanies, and especially around the Mississippi cities, the California crop has obtained a market on account of the fact that the Italian lemons would have to pay not only the freight over to the Atlantic seaboard, but also the freight inland; in other words, they had to pay the inland freight. It was found that that market could be saved the American product, and congress found it necessary to advance the tariff in order to do that. As soon as that was done the railroads immediately gave notice of an advance of

their tariff rate from the west and thereby took away from the growers the advantage which congress wanted to give the growers. I simply state that fact in order to show the motive which congress had in making the advance in the tariff, and that by the action of the railroad companies the act of congress is being entirely nullified.

When we filed this bill against the three railroad companies the fact is that these railroads were corporations created by the laws of other states; they were all engaged in business in California, having lines of railroad running through the southern district of California, and they were served in the usual manner.

Upon the order to show cause why a temporary injunction should not issue the three defendant railways filed their pleas; they appeared specially and filed what they called pleas to the jurisdiction.

The first ground of the plea was, as stated by counsel, that the defendants were non-residents of that judicial district. and not within the jurisdiction of the court. The second ground of the plea, I will read a paragraph from the printed record at page 61:

"That this court has no jurisdiction to determine "whether a rate published by defendants as required by "law is reasonable or unreasonable prior to the determi- "nation thereof by the Interstate Commerce Commis- "sion, but that such jurisdiction is vested exclusively in "the Interstate Commerce Commission by the act of "congress approved February 4, 1887, entitled, 'An Act "'to Regulate Commerce,' and the acts amendatory "thereof and supplementary thereto."

The third ground of plea was that there were other railroads which were beyond the jurisdiction of the court, which had been parties to the joint tariff of rates.

The pleas alleged no facts in any way different from the facts set forth by the bill of complaint, but raise questions of law. Upon the hearing the pleas were overruled.

In order to first consider the effect of these pleas I would like to outline to Your Honors the theory upon which this bill of complaint was filed. Of course, we were aware of the provisions of the Interstate Commerce acts, and especially the amendment to the original act of 1887, which was passed in 1906, giving the Interstate Commerce Commission large administrative powers over the matter of rates and over the matter of regulation of carriers affecting rates. We knew, of course, that the law contemplated that those administrative matters were to be heard before the body selected to hear them. In view of that the complainants in this case filed with the Interstate Commerce Commission, about the first day of November, just as soon as they had notice of this proposed advance of rates, a complaint against all of the parties and the Transcontinental Freight Bureau. The tariff of rates was filed by the Southern Pacific Railroad Company, the Atchison, Topeka & Santa Fe Railroad Company, and the Salt Lake Railroad Company as the initial carriers of citrus fruit; they filed that with the Interstate Commerce Commission, and afterwards, it having been filed, these other lines, through an arrangement with the initial lines, filed what they called concurrences. The initial lines have entire control of the shipment, issuing through bills of lading, as pro-

vided for in the Interstate Commerce act, and of course under that act the initial carriers are liable for damages for any injury to the fruit, whether occurring on their own lines or over a connecting line. Those are the provisions of the law under the Interstate Commerce act. The bill alleges that the tariff of rates was filed by the initial lines, they having control over the freight and they issuing through bills of lading and making arrangement for the transportation.

We filed a complaint with the Interstate Commerce Commission showing the excessive character of the proposed advance in rates on lemons and showing that it was unjust, unreasonable and excessive, and asked for a speedy hearing on that complaint. But the facts, as shown by the bill of complaint in this case, were as follows: There were some thousands of cases pending before the Interstate Commerce Commission—other cases; they were loaded to the guards with complaints. The only tribunal to hear all these matters was the Interstate Commerce Commission. We showed by the bill that it would be impracticable and impossible for us to get a hearing for many months, probably from one to two years before it would be disposed of by the commission. The former case before the commission, as shown by the official records, to which the bill refers, was pending before the commission some five years before a final decision was entered. We thought if we could get a hearing in this case in a year we would do exceedingly well.

There being some 500 defendants, we had to serve them all; we found it difficult to serve all those parties. We found that while they were parties concurring in a

joint tariff they did not maintain offices where they could be found, and we did not know how to get at their offices, and although we have pressed that diligently since the first of November we have not yet been able to even serve all the defendants in the case before the Interstate Commerce Commission, or had not at the last information I had on the subject, although we have had agents in every state in the Union trying to find these railroads and get service upon them; but we have not yet been able to serve them.

Now, while the Interstate Commerce Commission is an administrative body, exercising some legislative powers, yet it has been decided over and over and over again that they have no judicial powers. Notwithstanding that they have no judicial powers, and that they act only as an administrative body, they are clothed with judicial forms to exercise their administrative powers. They must have notices served on all the defendant railroads, and they must have a hearing, they must take testimony, answers are to be filed by these 500 railroads, 500 attorneys may come in and argue the cases; testimony may be taken by 500 defendants, it can be taken all over the country; then comes the decision of the commission. All of that takes time.

The bill of complaint in this case showed these facts in a general way, and sufficiently to present the question before the court. And it was shown that this rate could not be enjoined by the Interstate Commerce Commission, it being a mere administrative body, and having no judicial power, and that the case could not be heard until irreparable injury would result to the complainants.

It was shown that the margin of profit of the lemon growers was so small that it would result in a loss to them which would put them out of business in the raising of lemons; that they could not maintain their groves under these tariffs; it was shown that they would lose the markets of the Mississippi Valley, which would be taken by foreign growers; and it was shown that if they were compelled to resort to actions at law it was a matter for which no compensation could be recovered, it was impossible of ascertainment, the loss of existing markets, the loss of existing groves; that it would require a multiplicity of suits against the railroads to get the money back because the money is taken and divided among all the roads, it is divided among all the parties that have concurred in the joint tariffs; it would require long delay to collect it; it would take a succession of suits; it would require great expense and much complication. Every ground of equity is presented by the bill, and all those grounds of irreparable injury are shown.

So without dwelling upon that part of it any further I will refer simply to the proposition, shown by the bill, which is that irreparable injury is being done to the complainants for which they had no remedy at law or otherwise before the commission.

Having done that, I want to call Your Honors' attention to the theory upon which we filed this bill. The railways that are engaged in interstate commerce, corporations engaged in transporting passengers and freight between the states, under the authority of this national

legislation, are in the exercise of franchises conferred by the United States for public purposes.

As expressed in the cases of:

California v. Pacific Railroad Company, 127 U. S. 1-39;

Luxton v. North River Bridge Co., 152 U. S. 525, 533;

Lake Shore Railroad Co. v. Ohio, 172 U. S. 285, 309, 310;

Donovan v. Pennsylvania Co., 199 U. S. 279, 292.

They are public agencies of the United States government, carrying on a public function, in control of the highways of this country, empowered by the laws of congress to fix the charges and rates for transportation over these public highways, the only highways there are in the country, for the transportation of interstate freight. We are absolutely dependent upon those highways for transportation; there is no other way by which the appellees in this case can reach the markets in the country except over the national highways established by congress, and in the operation and control of these defendants.

In the cases I have referred to, the courts go on to say that railways exercising these public functions and franchises are simply agencies of the government in the exercise of public office, having public duties to perform.

The fifth amendment to the Constitution of the United States provides that no person shall be held to answer for a capital or otherwise infamous crime, and so forth; "nor shall any person be deprived of life, limb or prop-

erty without due process of law; nor shall private property be taken for public use without just compensation."

The cases cited in our opening brief, at pages 14 and 15, are to the effect that where a public corporation, such as a railway, has been endowed with authority to construct and maintain a railroad by act of congress, is, therefore, in the exercise of a public office as a public agency. If that company takes property without just compensation first paid, it is a violation of the fifth amendment to the Constitution of the United States.

We claim under the authorities cited in the brief that the correlative rights of the public and carriers are these —stated in Smythe v. Ames, 169 U. S. 466, 467; Covington Railroad Company v. Sanford, 164 U. S. 578, 596, "that what the company is entitled to ask is a fair return upon the value of that which it employs for the public convenience; on the other hand, what the public is entitled to demand is that no more be exacted from it for the use of a public highway than the services rendered by it are reasonably worth." The rights of the carrier are exactly equal to the rights of the public, no greater, no less.

When a railroad carrier comes into a court of the United States and seeks to prevent the legislature from establishing unjust and unreasonable rates it is doing only what the public always has a right to do under similar circumstances where the rate established is unjust, unreasonable and confiscatory. Their rights are equal and correlative.

That principle has been recognized in numerous decisions of the Supreme Court of the United States, which decisions are cited in our brief.

So that our contention is that although the Interstate Commerce Commission is an administrative body, and has general supervision over all matters of administration, of regulations and of rules relating to transportation, that when it comes to a matter of deprivation without compensation, when the bill shows that the defendants are taking property without compensation, and the commission has no power to stop it, we have then presented a case within the equity jurisdiction of this court.

Now I refer to our theory of this case, and to these general principles which we think govern the case, in order that we may grasp the scope of the plea filed by the defendants to what they call jurisdiction.

We have not sought to usurp or ask this court to usurp the functions of the Interstate Commerce Commission. We have shown by the bill that we have filed a complaint, now pending before the commission. We have only asked the aid of this court to stay the hands of wrongdoers until the commission can pass upon and determine the questions we have submitted. We have in no way invaded the domain of the commission. This court is reviewing the Circuit Court. The Circuit Court of the United States is a court of equity. It has jurisdiction of cases arising under the Constitution and laws of the United States; also those cases where there is diverse citizenship, where the amount in controversy exceeds $2,000.

The present case is a case which arises under the Constitution and under the laws of the United States; the amount in controversy exceeds $2,000—it exceeds a million dollars. The parties likewise happen to be citi-

zens of different states. The general jurisdiction of the court extends over such a case. If the court cannot grant the relief which we pray for in this case, it is not because of a want of jurisdiction generally, but it would be because there was an adequate remedy before the commission. Your Honors can see that this is the ground taken by the defendants here. They say, "that such jurisdiction is vested exclusively in the Interstate Commerce Commission, to hear and determine this cause." If it is vested there it is not because of a want of jurisdiction of this court; it is because there is a want of equity in the bill.

The jurisdiction of the court is complete. There is no act of congress which has abrogated or repealed the judiciary act of March 3, 1887, as corrected in 1888; congress never changed the jurisdiction of this court, nor sought to deprive it of jurisdiction in any case where jurisdiction was given in that act.

What congress has done is to provide an administrative tribunal to hear certain matters. Lying at the foundation of all equitable matters is the principle that no court of equity shall entertain a suit where there is a plain, speedy and adequate remedy at law, or by legal procedure. It is the equity that the defendants are striking at. They are seeking to present the proposition that because there is a legal remedy by procedure before the commission this court should not use the equitable power it has, or grant a writ of injunction to stay the hands of the railroads. They say, it would be inequitable to do that because there is a plain, speedy and adequate remedy by the legal processes, to-wit, before the com-

mission. So that when the defendants filed a plea to the jurisdiction of the court over the person of the defendant, and joined in that plea a further demand that this court should not proceed because it had no equity power to do it, or that because the equities are against us, they waived jurisdiction over the person.

We have cited the authorities in our brief, which we think are in point; one of the leading cases is Fitzgerald v. Fitzgerald, 137 U. S. 98. In that case the defendant joined a plea as to the jurisdiction of the person, a plea or demurrer as to want of jurisdiction over the subject matter of the suit. The court held that the question raised by the second ground really went to the merits of the controversy and was a waiver. The principle is that if a defendant wishes to avail himself of his personal privilege not to be sued in a particular district, he must present that question alone and ask for a ruling upon it; that if he joins with that a demand for a ruling on anything else he waives his privilege because he has no right to ask the court to decide anything else in the case upon the theory that the defendant is before the court and the court has jurisdiction of the defendant. In fact, the court has not any power to decide anything in the case at all if it has no jurisdiction over the defendant. So as soon as the defendant asked the court to decide something in that case going to the merits or going to the scope and power of the court, to take up the time of the court with rulings and decisions on those questions, it is upon the supposition that the court has jurisdiction over the person; the moment the defendant asks for a ruling on those questions he waives his objection to jurisdiction over the person.

We cite numerous cases on that proposition, including Railway v. McBride, 141 U. S. 127, and also a number of Circuit Court cases to the same effect.

Our contention is that although the defendants have named their plea a plea to "jurisdiction," what they have really asked the court to do is to consider the entire subject of this bill and of the Interstate Commerce act, and then ask the court to hold that it would be inequitable to grant an injunction in this case prior to the hearing before the Interstate Commerce Commission, in view of the power conferred by congress upon the Interstate Commerce Commission to hear and determine those matters; and that by doing that they have waived the point of jurisdiction over the person.

Moreover the only objection made by the plea (R. 61) is that the court cannot act prior to action by the commission—not that the court cannot act at all.

There have been a number of cases recently decided by the Supreme Court, since this bill was filed, some of them even since the injunction was granted by His Honor, Judge Morrow. One was the case of the Macon Grocery Company v. Atlantic Railroad Company, where the court held (Judge Harlan dissenting), that a Circuit Court of the United States had no jurisdiction over a defendant railroad company in any case arising under the laws of the United States except in the district of incorporation of the defendant, where it is domiciled and has its citizenship. In that case the court held that the defendants had duly saved their objections to the jurisdiction by presenting singly their objections to the jurisdiction over the person in due season and in due

time, and that the court had no jurisdiction to grant an injunction.

Another case is Interstate Commerce Commission v. Illinois Central Railroad Company, decided on the 10th of last January. In that case, without going into it in detail, the court held that as to all matters within the administrative power of the Interstate Commerce Commission parties complainant must proceed before that tribunal to right the wrong which they complain of. And the court in that case particularly points out the line of demarcation between those cases which go before the commission and those cases which go into the federal court in equity. I think the court has stated it exceedingly well, and I invite the attention of Your Honors to the opinion.

In those cases as to which the commission has no power to act, where it can grant no relief, or where the order which is sought is beyond the power of the commission, there the courts of equity of the United States may step in and grant writs of injunction originally without any hearing before the commission.

As to those cases where the commission has entire jurisdiction to grant the relief which is sought, the parties are remitted to the commission.

Those decisions are not antagonistic to our position in this case; they are entirely in harmony with our position; they simply affirm our views on the question from the beginning because we originally filed our proceedings before the Interstate Commerce Commission to get all the relief we could from the commission, and we only sought relief from the Circuit Court of the United

States in equity as to those matters where we had no remedy at all before the Interstate Commerce Commission and as to those the court clearly intimates in the Illinois Central case, the parties, either the railroad company on the one hand, or the shipper upon the other hand, may have redress in the Circuit Court of the United States in equity.

The defendant filed a third plea which goes to the question of whether there are or are not necessary parties defendant, which are not before the court, and which are beyond the jurisdiction of the court, those parties being the concurring railroads concurring in the through tariff rates. We have cited the cases which we think control that question. The leading case is that of the Interstate Commerce Commission v. Texas & Pacific Railroad Company, 162 U. S. 199, 201, 205. In that case the Interstate Commerce Commission was seeking to enjoin the Texas & Pacific Railway Company. That company and the Southern Pacific Railway Company were enforcing a certain through rate of transportation from a foreign country through the United States. It appeared that that rate was a rate which had been made by those carriers by a contract or an arrangement, and the connecting carrier was not before the court. The defendant in that case filed a plea to the jurisdiction, just as they have here, alleging that they made this tariff of rates with a connecting line, by some kind of an arrangement or contract and that the connecting carrier was not before the court, and that it was an indispensable party defendant, and therefore, asked for the dismissal of the case. The Circuit Court held that

notwithstanding that the connecting carrier was not there, and that although it was a *proper* party it was not an indispensable party. The Circuit Court of Appeals affirmed that judgment; and the Supreme Court of the United States stated distinctly what the proposition was, what the plea contained, and that the plea set up want of jurisdiction for want of necessary parties defendant, and the Supreme Court said that it agreed with the courts below that the other connecting lines, while they were proper parties, were not necessary parties in the suit. There are a number of other cases to the same effect. The reason for the rule is this, as I understand it: Here are a number of defendants who are about to perpetrate a wrong; by a combination of competing lines of railroads, forbidden by the law, they have filed, and are attempting to put into effect unreasonable, confiscatory and unjust rates; shown by the bill to be illegal; that tariff rate has not yet gone into effect, they have not yet effectuated it. We have asked the court to stay the hands of some of the wrong-doers. They attempt to justify their acts by saying they did those things by an arrangement or a contract with other parties not before the court, and that because we have not got the other wrong-doers in here, the court cannot protect the plaintiffs as against these initial lines. But the rule is that a wrong-doer cannot be heard to say that the act which he is threatening to do, the wrong which he is attempting to perpetrate, is being done under a contract with somebody else, and that the other fellow must be brought in before he can be stopped. The court says that if it has one of the wrong-doers, to that extent it

can save the parties, and that it will not dismiss the case for want of jurisdiction. Of course, we would like to have them all, we would like to have them all in. But they are not indispensable. That is the rule laid down in numerous other authorities cited in the brief.

The wrong which we are seeking to prevent has not yet been accomplished, the act has not yet taken effect We are not asking these defendants to make a new contract, or to do anything in connection with these other parties. We are asking the court to stay the hands of some of the wrong-doers, although we have not got the others here.

Mr. Asa F. Call, of counsel for appellees said:

We agree with counsel for appellants that the case is important. The question is important and if it is in the judgment of this court a question which should be certified to the Supreme Court we would join in the request that it be so certified. But if it is so certified we will of course, ask that the real question in the case be certified and not a question which we do not think is involved in the case. The question they have asked the court to certify we do not think is involved. There could be but one answer to it. The question they propound is this: In a case where the carriers have taken all due and legal steps to file a rate, may a court enjoin the taking effect of that rate until the commission can hear it? The question that we believe is involved in this case is this: "That where in a bill in equity in the Circuit Court of the United States, a satisfactory showing is made that the complainants will suffer an irreparable injury before the commission can act upon the case, and that all due

steps have been taken by the complainants to protect themselves through filing a complaint or a petition before the Interstate Commerce Commission, and that it is made to appear to the court that before the commission can hear and determine the matter the plaintiffs will suffer an irreparable injury which the commission cannot remedy nor compensate for in any way, may the court at a time before the rate becomes effective, under a proper bond fully securing the defendants against all proper loss and damage, enjoin the defendant carriers from putting into effect a tariff of rates increasing the present rates until such time as the commission can hear and determine the matter." This is the question that we feel is the vital point in this case. We show an irreparable injury, and that it is within the jurisdiction of equity, and not within the jurisdiction of any other tribunal in this country; and that it is a jurisdiction which has never been denied by the Supreme Court or by any other tribunal; in fact, in every case the safeguarding of the public has been particularly recognized.

Mr. Joseph H. Call said: I would further suggest that the further question should be certified, in addition to that stated in substance by my brother, and that is: "That in case it is found or determined that an injunction cannot be issued out of the United States Circuit Court under the circumstances stated in the bill, does not the enforcement of the confiscatory tariff of rates against the complainant complained of, they being unable to prevent its advancement before the commission, operate as a deprivation without due process of law and

a taking without just compensation, in violation of the fifth amendment to the Constitution of the United States."

Respectfully submitted,

JOSEPH H. CALL,

ASA F. CALL,

Attorneys for Appellees.

LEVY MAYER,

Of Counsel.